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Howard Leeson

Department of Political Science
University of Regina

Section 33, The Notwithstanding Clause: A Paper Tiger?

Peter Russell and Paul Howe
Editors' Note

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Introduction	3
The Philosophical Roots of Section 33	4
Early Variations of Notwithstanding	6
Developing the Charter of Rights	7
Federal-Provincial Negotiations, 1978-81	8
The Patriation of the Constitution	10
Reaction and Further Changes	13
Use of Section 33 after 1982	14
Post-Patriation Arguments about Section 33	15
Section 33 – A Paper Tiger?	17
Conclusion	20

Editors' Note

The notwithstanding clause is something of a puzzle. Its inclusion in the Canadian Charter of Rights and Freedoms was meant to provide some of the balance advocated by critics of judicial power by allowing governments to keep in force legislation struck down by the courts for a period of five years. In theory, it offers governments significant latitude to maintain policies and statutes found to be inconsistent with the Charter. In practice, it is rarely used.

This is surprising in view of the substantial controversy that has surrounded some important court rulings of the past several years. Howard Leeson addresses this conundrum in his contribution to the *Courts and Legislatures* series. Leeson offers a historical review of the notwithstanding clause, tracing earlier forms of the override principle in Canada's constitutional past, and recounting the discussions and debates that took place among ministers and officials in the constitutional negotiations of the late 1970s and early 1980s. He describes the infrequent occasions governments have invoked the clause and explores the reasons behind their wariness. Leeson takes the position that the notwithstanding clause should be brought into play more often, citing Supreme Court rulings where there has been no compelling reason for government inaction in his view. Coming at a juncture when many are questioning the balance of power between courts and legislatures, it is a timely review of an important element in the debate.

Leeson's is not the first of the *Courts and Legislatures* papers to address the notwithstanding clause. Janet Hiebert, in her contribution to the series, suggests that a Parliamentary committee should be established that would study whether the override should be used in specific instances. She also asks whether supra-majority parliamentary support should be required before it is invoked.* Governments have also been reflecting on the matter. The Alberta government, for example, has indicated that it will consult its citizens through a referendum before using the override clause.** In short, efforts are underway to resuscitate the clause, but these are sensitive to widespread unease with the prospect of governments overriding court decisions willy-nilly.

Those who have been happy to see the notwithstanding clause wither on the vine will find such efforts to seek the middle ground injudicious. Others will concur, though for quite different reasons: governments have the power to use the notwithstanding clause and should do so as they see fit. But for those positioned somewhere between the two poles of the debate, there is merit in searching for means and mechanisms that would facilitate use of the notwithstanding clause, but only in rare instances and after careful and exceptional democratic scrutiny.

* Janet L. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Social Policy," *Choices*, Vol. 5, no. 3 (July 1999), pp. 27-31. Hiebert also proposes that such a committee review legislation prior to its passage to ensure it is consistent with the Charter.

** Jill Mahoney, "Alberta Government Decides to Say No to Same-Sex Marriages," *The Globe and Mail*, March 19, 1999, p. A4.

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Section 33, the Notwithstanding Clause: A Paper Tiger?

Introduction

Any discussion about section 33 of the Constitution Act 1982, the so-called notwithstanding clause, involves notions about how power ought to be shared in a society, about sovereignty and the role of the individual, and about how these arrangements should be set out in written or conventional constitutional arrangements. As Peter Russell said in his book, *Constitutional Odyssey*:

> As people on other continents at other times have learned before us, the ideal of self-determination is as challenging as it is alluring ... When constitutional legitimacy comes to rest on the sovereignty of the people, the threshold question becomes just who these people are who are capable of sharing a common constitution based on their mutual consent.[1]

In particular, in an era when individual rights have been expanded and safeguarded in law and the ability of governments to interfere with them has been circumscribed in constitutions, the question of who should safeguard rights is far from trivial. The approach of Britain, until its increasing entanglement with the European Union, was to locate ultimate power in Parliament. The American response, albeit appropriated by the courts themselves after 1803, has been to give ultimate power to the courts. Increasingly in liberal democratic societies, the American model, that the courts should be entrusted with this responsibility, has been adopted. For a number of reasons, they are perceived as best able to arbitrate questions of rights, especially when it involves the state or its agents. Usually, however, judges are not democratically chosen and lack the legitimacy of having been elected. As well, they most often come from privileged academic or social backgrounds, rendering the courts unrepresentative of the general population. For these and other reasons, there is a reluctance on the part of many to give the courts the final say in questions that may be fundamental to the functioning of society.

In Canada, with the adoption of the Charter of Rights and Freedoms in 1982, an attempt was made to balance the two approaches. This was done through the insertion of a *nonobstante* clause, section 33, which allows the legislatures and Parliament of Canada, in certain instances, to override the provisions of the Charter. As might be expected, this attempt at compromise has drawn criticism from both sides of the debate about how best to protect rights. Supporters of the judicial approach are outraged that legislatures may still apply majoritarian standards to questions of fundamental rights, while supporters of parliamentary sovereignty consider any devolution of sovereignty to non-elected judges to be a violation of democratic principles. Those who support the clause point out, however, that it is the quintessential Canadian compromise, a compromise that leaves no one happy, but no one hurt. As Donna Greshner and Ken Norman have observed::

> The foundational issue brought into sharp relief by the question [about section 33(1)] is the balance of power between the judiciary and democratically elected legislatures.[2]

The story of how we came to adopt this provision is an interesting one. The conceptual origins of section 33(1) are found in earlier arrangements of the role of governments and bills of rights. However, the particular version that emerged in November 1981 and was ultimately enacted in 1982 had more to do with the raw politics of bargaining and chance phone calls late at night than

with reasoned debate about what might constitute a rational compromise between democracy and constitutional law. Some may see this as an unacceptable way to write the most fundamental document of Canadian society. It was, as is often the case, the best that could be done at the time.

Whatever the process or motivations in 1981, section 33 is part of the constitution of Canada and has been used by more than one legislature. However, it has been used sparingly, raising questions about the efficacy of the compromise and the continued usefulness of this provision. Some believe that it will become like the power of disallowance — the federal government's power to veto any provincial act — theoretically available but never used.[1] Others argue that as the courts become more active, blurring the lines between the powers of the legislature and the courts, section 33 ought to be used more.

This article traces the origins of section 33, discusses the historic compromise reached in November 1981 from the viewpoint of a participant in the negotiations, and looks at the instances and arguments surrounding its use since 1982. Finally, it comments on the proper role of the judiciary and legislatures in interpreting the Charter of Rights and Freedoms.

The Philosophical Roots of Section 33

Given the controversial nature of section 33, one might expect its origins to be clothed in anonymity. However, there is no shortage of people claiming authorship of both the idea and the specific form of this clause in the existing constitution. Such attention may reflect only the number and zeal of those who seek social prestige and attention in claiming credit for obscure causes. More likely, it reflects the firm and widely held belief that this particular section is not only a good addition to our constitution, but absolutely necessary to the health of Canada's democracy.

It should be pointed out that section 33 is not the only "notwithstanding clause" in the Charter. There is also section 28, which states "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." However, section 33 is the only one that deals with the question of whether the courts or the legislatures shall have ultimate authority for a decision regarding the rights and freedoms elaborated under sections 2 and 7-15.

While the origins of this particular clause are fairly recent, debate over it is not. When Hume said "Every man must be supposed to be a knave,"[4] he was expressing the view that because of self-interest, no individual can really be trusted to make decisions about the public good. Thus, Hume concluded:

> Good constitutions will not depend on the existence of great private virtues; they will ensure that the private interests of men, even bad men, will be so controlled and directed as to serve and produce the public good.[5]

In short, good government will depend on institutions that provide checks and balances on all decision-makers. Of course, in his era the concern in Europe was not with tyrannical elected officials or party discipline in parliaments, but with monarchs and the heads of churches.

The debate about who should make the final decision on any issue on behalf of the group or society has a long history. The exercise of this power has most often been associated with religious agencies, but secular authorities have often contested the right of churches to arrange "earthly" affairs. This clash continues in many societies in the 21st century, modern Iran being a good example of a state where the religious and secular authorities continue to debate their respective roles.

For countries like Canada with a parliamentary system, the contest between the monarchy and parliament has long been settled. Indeed, the contest between the executive and parliament seems to have shifted to become a contest between the cabinet and the House of Commons, which many believe has been won not only by the cabinet but, even more important, by the prime minister. Thus, in most parliamentary systems the judiciary has come late to the struggle, and has only recently been armed with written bills of individual rights that give it immense constitutional power.

Although this dimension of the struggle is quite recent in Canada, it is now fully engaged. It rests on the principle that no agency of the state, whether religious or secular, ought to be able to interfere with the individual's right to conduct his or her affairs in certain matters. This kind of prohibition has some parallel in human history, but the force with which it is asserted in modern society can be traced to two principles inherent in the notions of classical liberalism: the rule of law and democracy. The latter ensures that only elected bodies pass constitutional amendments that set the parameters of individual rights. The former restrains the zeal of elected bodies. Together they underwrite the powers inherent in modern constitutions. Patrick Monahan puts it this way:

> A country's constitution is the set of fundamental principles that together describe the organizational framework of the state and the nature, the scope of, and the limitations on the exercise of state authority.[6]

Thus, the making of laws may only be undertaken according to law, and not simply at the whim or behest of individuals with private power. Put another way, no one can make law who is not delegated to do so by constitutional arrangement, and no one is above the law.

However, written constitutions with bills of rights are not compatible with the British concept of parliamentary supremacy. In the parliamentary system the definition of rights still resides in a majoritarian body. For those who worry about this kind of concentration of power, bills of rights seem most appealing:

> The alternative approach...is to constitutionally entrench certain substantive limits on the manner in which state power can be exercised. We say that rights or norms are *entrenched* [emphasis in original] when they are set out in a fundamental constitutional document that takes precedence over all other laws and that cannot be amended through the ordinary process of law making.[7]

But a constitution is not a body of people. It cannot come to its own defence. Who should determine when there has been a transgression against constitutional values, and who should have the power to remedy such a transgression? In short, who will be the guardian of the constitution, and how will breaches be remedied?

While the answer to this question may seem self-evident today, it was not so in the United States when that country faced this matter in the early nineteenth century. In *Marbury v. Madison* in 1803, the Supreme Court of the United States "read into" the constitution a duty and right on its part to review the constitutionality of laws and actions of the President and Congress. But the elected officials of the time did not accept this unofficial role of the court. They insisted that each branch of the government was co-equal and the sole judge of the constitutionality of its own actions.[8] The precedent of judicial review became firmly entrenched in the United States, however, and was exported to many other countries.

One of the countries that quickly adopted this principle was Canada. In interpreting the British North America Act, both the Supreme Court of Canada and the Judicial Committee of the Privy Council had no difficulty in declaring acts of either the Parliament of Canada or the provincial legislatures to be *ultra vires*. Frederick Vaughan has summed it up this way:

> [W]hile Canadian courts in the past demonstrated a pattern of judicial deference to the will of the legislature, their role in the division of powers and reference cases did offer some scope for an early judicial activism of sorts. Thus, the judiciary has played an important role in the constitutional life of the country, although in the past it did so anonymously, and judges only rarely met with criticism.[9]

John Whyte, former constitutional adviser to the Saskatchewan government, argues this view even more strongly:

> Judicial control over governmental authority and legislative choices is no alien concept for Canada. We are a nation in which past solemn commitments are allowed to work to the disadvantage of current preferences. For instance, perfectly clear legislative preferences about the administration of laws are frequently frustrated by the prior constitutional commitment to separation of powers.[10]

The courts in Canada early and often exercised their authority to be the final arbiter as to whether or not a particular power was federal or provincial in character. However, they lacked the power to set aside actions of Parliament or the legislatures on the basis that they violated fundamental rights or freedoms.

Early Variations of Notwithstanding

The concept of notwithstanding began as a legal drafting technique. It was employed to overcome inconsistencies in legislative provisions so that one of the inconsistent provisions would prevail. For example, in sections 91, 94 and 101 of the BNA Act, 1867, there are elements of federal power over matters that would ordinarily be considered provincial, such as the federal power over patents which can infringe on provincial authority over property and civil rights. In the case of section 101, the federal government's power to create a system of courts is a subtraction from the provinces' general power to constitute courts under section 92(14). Thus, the notwithstanding formulation was used to "clarify" which section predominated.

It is not surprising, then, that this concept entered into discussions about the amending formula. The idea that an act or power should continue to exist in one part of Canada, despite the passage of a law or constitutional change that declared it null or void in other parts of the country, first arose in 1935 in discussions about an amending formula for Canada after the passage of the Statute of Westminster. In these discussions in the Continuing Committee on Constitutional Questions, the possibility for provinces to opt out of constitutional amendments that encroached on provincial power was first floated. A 1965 summary of the opting out formula said:

> In respect of most matters concerning the federal government and all of the provinces, by an Act of Parliament and the assent by resolution of the legislative assemblies in two-thirds of the provinces representing at least 55 percent of the population of Canada [in relation to matters enumerated in clauses 13 and 16 of section 92]...the legislature of any province...which has not approved...may continue exclusively to make laws in relation to the subject matters coming within such enactment.[11]

Thus, a province could continue to exercise power *notwithstanding* the constitutional change under the general amending formula, either by specific dissent or by inaction. In this regard, the concepts of opting out and notwithstanding are very similar. A law remains valid despite the action of another agency of government that has the power to declare it invalid.

The concept of notwithstanding was brought sharply into focus by the Canadian Bill of Rights, passed in 1960. Space does not permit a full history of the development of rights and their constitutional entrenchment in Canada. Suffice it to say that throughout the twentieth century the concept

of constitutionally entrenched rights was vigorously advocated by many, including John Diefenbaker, Tommy Douglas and Pierre Trudeau. During the two decades after the Second World War, there were several unsuccessful attempts to entrench a bill of rights in Canada. The major problem was the need for provincial approval. The provinces were disinclined to accept a charter of rights without resolving the problems of the amending formula and distribution of powers.[12] In 1960 the Diefenbaker government put before Parliament the Canadian Bill of Rights. Its passage marked the first time that comprehensive legislation of this type had been adopted at the federal level.[13]

The Bill of Rights was unique in many respects, but for our purposes section 2 is most important.

> Every law of Canada shall, unless expressly declared by an act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe...any of the rights or freedoms herein recognized and declared...[14]

This was the first insertion of a notwithstanding or *nonobstante* clause. Its purpose was to ensure that Parliament could still exercise sovereign authority in situations where this sovereignty might be challenged. But despite its addition, some were concerned that Parliament was in danger of losing its sovereignty. Commenting on this, Bora Laskin, later Chief Justice of the Supreme Court of Canada, noted that Parliament was hardly under siege:

> There has been some concern that the judicial elevation of the Canadian Bill of Rights to the position of being a statute that can effectively sterilize other federal legislation, has abrogated the doctrine of parliamentary supremacy. In the words of Abbot J., dissenting in *Drybones*..."it necessarily implies a wide delegation of the legislative authority of parliament to the courts."
>
> It may perhaps be stated somewhat differently that the Canadian Bill of Rights provides a prescriptive standard against which all federal legislation past and future must be measured, unless Parliament chooses to avail itself of the exception in s. 2 of the Bill and declare otherwise. Resort has been had to the so called "*nonobstante* clause" only once...but its very existence in what is still, after all, only a federal statute capable of being repealed, is at least some evidence that legislative supremacy in Canada has not as yet been imperilled.[15]

Whatever was said about the use of section 2 of the Bill was ultimately of little consequence. As many authors have noted, judicial interpretation of the Bill was "cautious and restrictive."[16] Since the Bill applied only to federal institutions and the courts were extremely deferential, there was little imperative for Parliament to "declare" a bill under section 2. The real importance of section 2 lay in the precedent that it established for later discussions.

Developing the Charter of Rights

Many believe that the attitude of the Supreme Court toward the Canadian Bill of Rights is a major reason for the push toward an entrenched charter of rights. Ian Greene is one of them:

> A major impetus for a constitutional charter of rights came from those who were disappointed with how the Supreme Court had interpreted the Bill of Rights. For them, the only solution was the replacement of the legislative supremacy approach under an entrenched charter of rights.[17]

Supporters of a charter of rights received a boost in 1968 with the election of Pierre Trudeau. There is little doubt that without Pierre Trudeau the movement to adopt a charter would have failed. Immediately after becoming Prime Minister in 1968, he initiated the process that resulted in what is now referred to as the Victoria Charter. It was the most extensive process of constitutional

review ever undertaken in Canada. The centrepiece of this effort was the entrenchment of a new charter of rights that would include language rights.[18] The result, as we know, was failure to come to an agreement in 1971. However, the development of the texts for an entrenched charter, resulted in what some call a "soft *nonobstante*." The proposed charter stated:

> Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or the rights or freedoms of others, whether imposed by the Parliament of Canada or the legislature of a province, within the limits of their respective powers, or by the construction or application of any law.[19]

A "soft *nonobstante*" was a direction to the judiciary to be respectful of the need to consider reasonable limits on individual rights in society.[20] It preserved judicial supremacy, while leaving the impression that the courts ought to be extremely deferential to Parliament. There was no "hard *nonobstante*" clause similar to section 2 of the Bill of Rights. It is significant that the negotiators thought that some kind of limit on judicial discretion was needed. No one, apparently, felt that a charter could be entrenched without some safeguard or check on the courts.

Federal-Provincial Negotiations, 1978-81

Although the Victoria Charter was not adopted, the Trudeau government did not abandon its efforts at constitutional change. These attempts were sporadic until 1976, when the election of the Parti québécois government in Quebec gave an enormous impetus to finding solutions to the problem of national unity. However, by this time Quebec represented only one of several challenges to national unity, and the entrenchment of a charter of rights was no longer perceived to be paramount. As Roy Romanow said in his book two years after patriation:

> The irony of Canada's most recent constitutional agreement [1981] is that it was not, in fact, driven by the modern conception of the state as articulated by Trudeau. On the contrary, the period of constitutional negotiations, which began after 1976, was entirely the product of older, communitarian impulses. It was the convergence of forces brought about by the OPEC oil cartel and the election of the Parti québécois in Quebec.... The immediate cause of the struggle to produce a new constitution was the conjoining of regional/economic and regional/ethnic forces.[21]

The period 1978-81 was a watershed for many reasons. Of course, the most important issue in 1978 was the impending referendum in Quebec. The Parti québécois had adopted an official policy of "*étapisme*," a step-by-step progression toward independence. Essential to this policy was the promise to hold a referendum on sovereignty during its first term in office. Only after a "yes" vote in that referendum would the Parti québécois proceed to negotiate with the rest of Canada on sovereignty with some form of economic association. The PQ was strong, reformist and brimming with confidence.

By contrast, the Liberal federal government was in a period of decline. Trudeau had been Prime Minister for ten years and was widely disliked in parts of Canada. He lacked the political authority that a recent election would have given him. Indeed, the government was in its fourth year and appeared to be avoiding a date with the electorate.

In western Canada the sudden rise in natural resource and grain prices had precipitated an economic boom, unprecedented in the region's history. Enormous amounts of wealth were flowing into the provincial treasuries. In order to "moderate" the flows of capital in Canada and to "protect" consumers from high prices, the Trudeau government

had brought in fiscal policies that many in western Canada saw as extremely discriminatory. Western alienation was alive and well during this period.

This new array of regional forces left the federal government with no option but to try and fold all of the elements of constitutional change into one package, including a charter of rights. In June 1978 the federal government tabled Bill C-60, a comprehensive package of constitutional proposals that included an entrenched charter of rights. The procedure for adoption was incremental, with the charter to apply first to the federal government and any provinces that chose to adopt it. Bill C-60 contained the "soft *nonobstante*" of the Victoria Charter. There was no notwithstanding clause.

In August 1978 the provincial governments responded by offering to negotiate an entire package of constitutional changes. The details of these negotiations are well documented.[22] In order to deal with the large number of issues, the first ministers struck a committee of ministers called the Continuing Committee of Ministers on the Constitution (CCMC). It was co-chaired in 1978-79 by Roy Romanow, Minister of Intergovernmental Affairs and Attorney General of Saskatchewan at the time, and Marc Lalonde, representing the federal government. Of the fourteen items to be discussed by the CCMC, three dominated the negotiations. They were patriation with an amending formula, a charter of rights with language rights, and natural resources. Eventually, these three items came to form the essential trade-off for agreement in 1981.

The CCMC met three times in late 1978 and early 1979. The charter of rights put forward by the federal government at the first meeting was the charter contained in Bill C-60. Throughout the negotiations the participants took the position that nothing was agreed to until everything was agreed to. Thus, the negotiations on any particular item were always conducted with an eye to progress on other items.

On the matter of an entrenched charter, the choices had been narrowed realistically to three options. These were a full charter (fundamental, democratic, legal, mobility and equality rights) with a "soft *nonobstante*" clause, a limited charter (fundamental and democratic rights) with no *nonobstante* clause, or a full charter with a hard notwithstanding clause. However, some governments, like that of Manitoba under Sterling Lyon, were adamantly opposed to any entrenched charter with or without a *nonobstante* clause, a position that they maintained throughout. Lyon, a traditional conservative, believed fervently in parliamentary supremacy. Saskatchewan, headed by New Democrat Allan Blakeney, also opposed the entrenchment of a charter. Blakeney believed in legislative supremacy too, but for reasons that were exactly the opposite of Lyon's. He believed that the courts were essentially the most conservative institutions in society and would use a charter to block the expansion of social entitlements. His government was willing to accept a charter with a *nonobstante* clause and entrenched language rights. He agreed with the latter as part of the "confederation bargain." By contrast, several provinces, New Brunswick for example, were enthusiastic supporters of entrenched rights. Finally, a third group of provinces was ranged between these two views, some arguing for a limited charter and others withholding their support pending the outcome of other items on the agenda.

The concept of a *nonobstante* clause had not been discussed for ten years. The Trudeau government, while opposed to it in principle, agreed to consider it in 1978. Briefing notes from Saskatchewan had the following to say:

> Several provinces were opposed to an entrenched Charter of Rights although there was an indication that entrenchment would be acceptable provided that an appropriate override clause were included. The federal government suggested that such a clause could be made optional. Most provinces did not favour this.

> The federal government was clearly anxious that there be some progress toward the adoption of a Charter.[23]

By the time the first ministers met in February 1979 there had been some shifts amongst the provinces. Two important things had happened. First, many of the provinces had agreed to entrench a limited charter, i.e., one dealing with fundamental freedoms, democratic rights, and language rights. They only agreed to the latter if appropriate safeguards could be worked out. A Saskatchewan briefing note confirms this:

> Most provinces seem to be prepared to accept the entrenchment of fundamental freedoms (speech, religion, association), democratic rights (universal suffrage, 5 year parliaments, annual sessions) and language rights (the nature and extent of which would have to be carefully considered) if the federal government will defer the remaining portions of its proposed Charter...for consideration in a later stage of constitutional discussions.
>
> The feds [*sic*] are attracted by the possibility of a deal along these lines, but would rather inscribe the entire Charter in the revised constitutional bill, and allow provinces to opt into remaining portions as and when they see fit.[24]

The federal government agreed to the possibility of opting in at various times to some sort of charter of rights, a sort of smorgasbord approach, and, surprisingly, it agreed to consider the insertion of an override or *nonobstante* clause.[25] The notwithstanding clause would apply to legal, nondiscrimination, and mobility rights. In addition the "soft *nonobstante*" clause would remain, that is, the "reasonable and prescribed by law" clause.

At the First Ministers' meeting in February of 1979, the matter of the charter was discussed both privately and publicly. When the Prime Minister called for positions, the provinces were split on the various portions of the charter. All but Manitoba agreed to entrench fundamental and democratic rights.[26] (This is remarkable, given the disagreement at the CCMC discussions in December.) No province indicated that these should be subject to a *nonobstante* provision. (This is quite different from 1981, as we will see) On other parts of the charter the first ministers were split, with only five supporting entrenchment of language rights and most opposing the entrenchment of legal and nondiscrimination rights.[27]

That no agreement resulted from the FMC did not surprise most observers at the time. The fact that the Parti québécois government was unlikely to agree to anything prior to its referendum, the lack of agreement on sharing oil revenues, and the length of the list of items up for negotiation all militated against any agreement. As noted by some participants, the political climate and timing were all wrong:

> Finally, although the governments generally endeavoured to submerge their political and ideological differences while engaged in federal-provincial discussions at the CCMC level, by February, 1979, with a general election only weeks away and the defeat of the Trudeau government looming as an increasingly important political event, the policy of non-partisanship evaporated.[28]

As we know, the political climate did change. In the spring of 1979 the Liberals were defeated by the Conservatives under Joe Clark, who formed a minority government. This government only lasted nine months. In February 1980 the Liberals, once again led by Pierre Trudeau, were returned with a majority government.[29]

The Patriation of the Constitution

The turbulent political events of 1980 and 1981 mark a significant watershed in the history of Canada. It was an extraordinary time. In Quebec, the federal Liberals were returned with almost every seat, the first referendum on sovereignty was held and defeated,

the Parti québécois was re-elected in 1981, and patriation of the constitution was agreed to over the objections of the Quebec legislature. In BC, Alberta and Saskatchewan, no MPs from the governing party were elected, the National Energy Policy was met with a firestorm of protest that led to reductions in oil deliveries to eastern Canada, and separatist parties were founded. In the end, however, the western provinces signed an energy pricing deal and agreed to the constitutional package negotiated in November 1981.

It is difficult to overestimate the impact of the conjunction of these events. By the summer of 1980 the political situation of 1979 had effectively been reversed, and this was crucial to the patriation efforts. It was now the Trudeau Liberals who had successfully defeated the Parti québécois in a referendum in Quebec and who had a new majority mandate, while the Parti québécois had lost the referendum and were clinging to power in their fifth year. To use sports parlance, momentum was on the Liberal side. As we now know, the Prime Minister had decided to proceed with patriation and a charter, even if it meant acting unilaterally.

The process proposed by the federal government in June of 1980 was not new. The reconstituted CCMC, now co-chaired by Jean Chrétien and Roy Romanow, would meet through the summer and present their best efforts at a First Ministers' Conference in the fall. Trudeau made it abundantly clear that he was prepared to proceed with or without the provinces. In the subcommittee studying the charter of rights, ministers and officials started from familiar proposals. Indeed, although they laboured mightily throughout the summer, little had changed. The federal charter looked much like C-60 and the proposals of the 1979 First Ministers' Conference.

There was discussion of the *nonobstante* clause, initiated mainly by Saskatchewan, but the federal officials and ministers did not even agree to consider it. This was quite different from the negotiations in 1979, when the federal government agreed to its inclusion and use in regard to judicial and nondiscrimination rights. As they were fond of saying that summer, "That was then and this is now."

In the leaked strategy document developed by the federal government for the First Ministers' Conference in September 1980, dubbed the "Kirby memorandum" after the official who had drafted it,[10] the legislative override clause is referred to as follows:

> Federal officials raised doubts respecting the necessity for an override clause but suggested that if there should be one, it should be restricted by requirements that any law enacted under an override provision be adopted by a 60 percent majority of the legislative body and expire after a specified time (e.g., 5 years).[11]

Later in the document, the federal government outlined its preferences. These did not include the notwithstanding clause.

As we know, the First Ministers' Conference of September 1981 failed to produce an agreement and the federal government proceeded unilaterally with a package of proposals that included a charter of rights but no *nonobstante* clause. It did not surface again until November 1981, when, after the Supreme Court decision in September declaring the federal action unconstitutional in the conventional sense, the first ministers assembled in Ottawa for one last attempt to secure agreement on a package.[12]

In the raw bargaining of the First Minister' Conference between November 2 and 5, 1981, it became apparent that if there was to be an agreement there would have to be a charter with language rights that was acceptable to the federal government, an amending formula that was acceptable to the provinces, and "something" on natural resources. Within each of these sections there would also have to be provisions to make it more palatable to the party being forced to com-

promise. Thus, within the natural resources section the federal government retained considerable control. Within the amending formula several provisions mitigated the original formula put forward by Alberta.[13] Within the charter, the notwithstanding clause was reintroduced.

At the beginning of the conference there was pessimism about the ability of the participants to overcome the negative influences of the previous year. Harsh words and entrenched positions had become the order of the day. Indeed, it was widely believed that both Prime Minister Trudeau and Premier Lévesque would have preferred to see the conference fail in order to continue their respective fights.[14] Not surprisingly, many of the objections to an entrenched charter of rights remained unchanged. Manitoba was unprepared to accept any entrenched charter, while several provinces wanted an override clause for some sections.

Most of the conference was *in camera* with no minutes. Our knowledge of what went on is limited to the personal notes of those of us who were there. It is fair to say that most of the discussion surrounded the amending formula, but there was a fair amount on the charter. Generally, everyone knew that one part of an agreement depended on progress in another area. Real bargaining began on the second day and was most intense on the Wednesday afternoon. At that point, the Prime Minister and the Premiers of Alberta and Saskatchewan had an exchange on the integration of the amending formula with a charter that had a notwithstanding clause. Trudeau attempted to point out what he considered a logical inconsistency in Blakeney's position, that is between his argument to make the charter more flexible with a notwithstanding formula and his support for a fairly rigid amending formula. As well, Trudeau obviously thought that the combination of the opting out portion in the amending formula and the notwithstanding clause in the charter was too much. The following are excerpts from that discussion:

> Blakeney: As to *nonobstante* [for the charter] I think that is a long way ahead — it would be a long step forward and would gain some support.
>
> Trudeau: I think that we would quickly find objectors. My view is that if you have a notwithstanding in the part on Education, you have *nonobstante* and opt out. You get us coming and going.
>
> Lougheed: But opting out has to do with jurisdiction and being able to do something that others want but we don't. *Nonobstante* is different.[15]

The rest of the afternoon did not go well. The first ministers agreed to break until the morning, at which point they would resume in public, presumably to report failure.

As we know, during the night a series of negotiations took place that eventually resulted in the package of proposals that became the patriation package. These negotiations on the night of November 4, 1981 did not include the Premiers of Quebec and Manitoba. Both were considered unlikely to agree to a package, the former because of Quebec's stand on sovereignty and the latter because of his inflexibility on an entrenched charter of rights. In anticipation of a conference failure, the Premier of Manitoba had already returned the previous day to campaign in the provincial election. Officials, ministers and some of the other Premiers met and spoke on the phone during the night. They managed to put together a compromise package.[16]

In effect, the provinces traded the amending formula for the charter. There were already some changes to the charter that had been accepted in Parliament in the unilateral action period in 1981; the major change of the November 1981 First Ministers' Conference was the inclusion of a notwithstanding clause, section 33. This was a *sine qua non* for most of the provinces that had opposed Trudeau. The matter of its ambit was undetermined, however. In the original draft of a com-

promise document, both Saskatchewan and Newfoundland restricted its application to sections 7-15, legal and nondiscrimination rights. This was consistent with the proposals of the previous three years. Alberta insisted, however, that it apply as well to section 2 pertaining to fundamental rights and freedoms. The others agreed. This proposal was communicated to Ontario, and through them to the federal government. At 3:00 a.m. on November 5, 1981, members of the Ontario delegation contacted the author to determine whether or not Alberta was firm in the application of the notwithstanding clause to fundamental rights and freedoms. I indicated that I thought that they were and that it would have to stay. Jean Chrétien and the federal delegation were furious at this.[37]

At the private meeting of first ministers the next day, the subject of the *nonobstante* clause was one of three important issues. Trudeau tried to raise the legislative majority required to opt out, a time limit on the *nonobstante* clause and a First Ministers Conference on aboriginal rights:

> Trudeau: I'll tell you my opinion. I deeply feel that it is a mistake not to be able to go to the people. But I'm prepared to swallow too. [On the opting out] I put a suggestion to you. When it was considered by you, [earlier in 1981] you considered a 2/3 vote [in the legislature] but it's a bit late in the day. [On notwithstanding] Let's give it the test of time. A compromise came to me. I propose a compromise to you. That the *nonobstante* have a five-year sunset clause. I don't think that we can drop aboriginal rights out completely. My suggestion. Put in a First Ministers Conference for the future.[38]

All these suggestions were accepted by the nine provinces that had agreed to the morning's proposals. Quebec refused to agree to the package. The inclusion of a notwithstanding clause in the charter of rights had become a reality.

Reaction and Further Changes

The first ministers knew that the original accord was a fragile deal. Indeed, at the end of the private session Trudeau held up the copy signed by the nine premiers and said, " I better take this and run." They had agreed on two key issues: first, that the legal drafting should take place immediately, and second, that no substantive changes would be made to the accord without the agreement of all. The latter point became important when women's and Aboriginal groups reacted strongly against the accord. Aboriginal groups were outraged that a section dealing with Aboriginal rights had been taken out at British Columbia's insistence. They demanded that it be reinstated. Women's groups reacted strongly against the ambit of the notwithstanding clause. Chaviva Hosek, Vice-President of the National Action Committee on the Status of Women at the time, outlined this reaction:

> The fears [of women's groups] were justified. In the final desperate negotiations to achieve substantial agreement between the federal and provincial governments, women's interests were sacrificed, almost by neglect.... Confusion reigned. The Accord was reached on November 5. But when the Prime Minister was asked in the House of Commons whether section 28 would be subject to the override, he was unable to answer. It was not until November 9 that he made clear that it was. Women's groups were appalled.[39]

As already discussed, section 28 is a "directional clause" that states "notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." The question raised after November 5, 1981 was whether or not section 28 would be subject to section 33. The reason for the delay in the Prime Minister's response was simply that no one had considered section 28. It was not, as Hosek stated, that women were unimportant, but that all atten-

tion had been concentrated on sections 2 and 7-15. The dispute arose when it became clear to the legal drafters that it would be necessary to determine the interaction of these clauses. The Saskatchewan government believed that section 28 as it stood could endanger affirmative action programs. Others, including the federal government, dismissed these fears. The Premier of Saskatchewan was unfairly branded as being "against women." Given the government's legislative record on women's issues, this was patently absurd.

The matter was further complicated by the Saskatchewan position that if the "deal" of November 5 was re-opened to change section 28, Saskatchewan would insist on the reinstatement of the provisions on Aboriginal rights. This caused concern in Alberta and British Columbia. Eventually both demands, that section 28 remain as it had been before the November 5 draft and that Aboriginal rights be reinstated, were acceded to. As Hosek said in 1983, "the power of section 28 in relation to other sections is not clear..."[40]

Use of Section 33 after 1982

Given the ferocity of the debate about the inclusion of a *nonobstante* clause, one might have expected its use to be frequent and controversial after the proclamation of the Charter of Rights and Freedoms in 1982. Such has not been the case. It has only been used by two legislatures, Quebec and Saskatchewan. Not unexpectedly, the use of section 33 by the Quebec legislature was controversial. In 1982 the Parti Québécois government secured passage of Bill 62 in the legislature, which added a standard notwithstanding clause to each of the statutes in force in the province. As well, it became standard practice to add the clause to each new bill. This use of section 33 was in protest against the fact that Quebec had not agreed to the constitution in 1981. The practice continued until 1985, when the new Quebec Liberal government discontinued it. This blanket use was challenged in court on several grounds. The Quebec Court of Appeal struck down this use of section 33, but its decision was reversed by the Supreme Court of Canada.[41]

The Liberal government of Quebec used section 33 on five different occasions. Four appear to have been uncontroversial.[42] The fifth, in 1988, was extremely controversial. In that year the Supreme Court of Canada struck down a portion of Bill 101, Quebec's language law, which dealt with the use of languages other than French on commercial signs.[43] In effect, the court said that the law in question was an infringement of the Charter right to freedom of expression. A majority of francophone Quebecers still felt that this portion of Bill 101 was necessary to protect the French language in the province. The Liberal government was forced to respond by reinstating the portion of the law dealing with exterior signs, using section 33 to exempt it from the Charter.

While this action was popular in Quebec, the use of the notwithstanding clause in this manner provoked a negative reaction in the rest of Canada. Many believe that this action was mainly responsible for the defeat of the Meech Lake Accord, because it allowed some provincial governments (Manitoba in particular) to procrastinate and build opposition to the agreement.

The Prime Minister at the time, Brian Mulroney, made it quite clear that he believed section 33 was both unacceptable and a mistake. In a speech to the House of Commons in 1989 he said:

> The framers of the flawed Constitution Act of 1982 inserted the notwithstanding clause which limits our most fundamental freedoms...never before nor since in our history has a Prime Minister of Canada made a concession of such magnitude and importance. Never before has the surrender of rights been so total and abject.[44]

After the defeat of Meech Lake, the Mulroney government made some half-hearted efforts at seeking the repeal or modification of the clause, but they came to nothing.

The use of section 33 in Saskatchewan was less spectacular, but equally controversial in the province. The specific case involved a labour dispute between the government of Saskatchewan and its workers, represented by the Saskatchewan Government Employees' Union (SGEU). In the fall of 1985, in an attempt to put pressure on the government, the SGEU had commenced rotating strikes. In January a mediator released a report, which the union rejected. The government of Premier Grant Devine decided to end the dispute by legislation. On January 30, 1986, it recalled the legislature and introduced Bill 144, an act that forced the union back to work and provided the terms of a new collective agreement. The act was remarkable in one respect: it contained a clause exempting it from the Charter of Rights and Freedoms.[45]

The reason for doing so was rooted in a 1984 court decision, in which another piece of labour legislation had been struck down. That legislation had ordered the dairy workers in the province back to work, but had been struck down by the Saskatchewan Court of Appeal on the basis that it infringed on freedom of association as guaranteed in the Charter.[46] (Eventually the Supreme Court reversed this decision.)

The addition of the notwithstanding clause was challenged on several bases, but one in particular was novel. It was the first time outside Quebec that the notwithstanding clause had been used prospectively, that is, not in response to a court decision, but in anticipation of it. Interestingly, many who had agreed with the insertion of a *nonobstante* clause in 1981 had not anticipated that it would be used to "bullet-proof" legislation. As we know, the use of the clause in this way is not prohibited, and one can anticipate that it might be used this way again in the future.

These are the only actual uses of the notwithstanding clause since 1982. It has been 12 years since Quebec used it. As we will see in the following discussion, its use has been urged many times and has even been publicly contemplated by the Premier of Alberta, but to no avail.

Post-Patriation Arguments about Section 33

Arguments about section 33 inevitably involve rights and the best way to protect them. That is, everyone is in favour of rights, no one is against them. Thus, when reduced to its essence, the debate raises two basic questions: what should be considered a right, and which institution can best protect those rights, the courts or the legislatures? Left out of the equation for the most part is any suggestion that rights ought not to be protected, that is, that certain social attitudes and practices should not be placed in a special category when it comes to political claims in our society. Those who argue against entrenched charters do so from the perspective that the list of rights ought to be very limited, and that these rights are better protected by legislatures. In particular, they reject "expanded" charters as devices designed to raise the profile of what are really only political claims. What we are left with they argue, when you have an expanded charter, is a process that looks suspiciously like the political process except that some matters are now of a "higher order" and get priority. More will be said about this later.

Most of the arguments about section 33 are set out in two articles, one by John Whyte and the other by Peter Russell, both published by the *Alberta Law Review*, in 1990 and 1991, respectively.[47] Whyte vigorously attacks the insertion of the clause, despite the ironic fact that he was the chief constitutional advisor to Premier Allan

Blakeney at the time of the adoption of the clause in 1981.[48] Whyte quite forcefully rejects the argument that justifications for section 33 can be found in Canadian constitutional principle, opting instead for a more relativist foundation anchored in social policy needs:

> In my view these attempts to locate a justification for the override procedure in Canadian constitutional theory are wrong for two reasons. First, the principles at work in the design of the Canadian state support not allowing any legislative exemptions from court enforced rights at least as powerfully as they support including such a power in the constitution. Second, arguments rooted in constitutional principle distract us from enquiry into the actual social goods and bads that are likely produced by the practice of exercising the legislative power to override Charter rights. In short, this sort of debate keeps us from choosing a policy that is good because it reflects the actual aspirations of the community.[49]

Whyte goes on to outline these arguments in detail, citing the three constitutional principles which, he says, have been used to argue for a *nonobstante* clause. These are legalism, democracy and federalism. He argues that the rule of law is a widely accepted principle whose ultimate expression is constitutionalism. Constitutionalism is

> [the] process by which political expressions from one age can bind future ages unless equally formal political processes are mustered to remove the constitutional constraint. In short, Canadian constitutionalism is not in thrall to the idea that populations are free to determine their own best interests from moment to moment. Judicial control over governmental authority and legislative choices is no alien concept to Canada.[50]

He also points out that courts have more often than not been entrusted with the ultimate right to adjudicate constitutional arguments in Canada.

In dealing with the argument that charters erode majoritarian control, he expresses the view, albeit somewhat weakly, that democracy is not solely about majorities. Indeed, he proposes a more profound concept of democracy that includes political participation, equality, autonomy and personal liberty. He goes on to say that "the point that needs to be made is that the democratic principle provides a powerful pedigree for judicial control over political choices that erode some fundamental human rights."[51] He also dismisses arguments based on federalism, largely because of the idea that the courts have been heavily involved in making final decisions that bind parliaments.

Whyte's argument rests primarily on the assumption that the judiciary is not as subject as Parliament or a legislature to political whim, that it is a more trustworthy agency when dealing with individual rights:

> The primary reason for wishing to do away with the override clause is that the anxiety that produced the political demand for entrenched rights cannot be rationally calmed in the face of the legislative power granted by section 33. That anxiety is simply this: political authority will, at some point, be exercised oppressively; that is, it will be exercised to impose very serious burdens on groups of people when there is no rational justification for doing so.[52]

He goes on to list examples of this oppression, many of which are familiar.

In answering the challenge, Peter Russell avoids wholehearted support for the *nonobstante* clause. Indeed, he has been criticized by some for being so lukewarm that he does more damage than detractors do.[53] However, in examining the substance of the arguments, while rejecting what he calls Whyte's "disdain for democracy," he correctly defines the main issue as the choice between judicial and legislative supremacy, and concludes that Whyte is wrong. Russell argues strongly that legislative and judicial supremacy are both wrong. In effect, he seeks the middle ground between those who see no role for the legislature in defining and enforcing rights and those who abhor entrenched charters for detracting from parliamentary sovereignty:

> In a nutshell, the argument about the substance of decision-making is as follows. Judges are not infallible. They make decisions about the limits and nature of rights and freedoms which are extremely questionable. There should be some process, more reasoned than court packing and more accessible than constitutional amendment, through which the justice and wisdom of these decisions can be publicly discussed and possibly rejected. A legislative override clause provides such a process.[54]

He goes on to enlarge on this argument and provide examples. Finally, he concludes:

> Are the judiciary and the judicial process so inherently superior to the legislature and the processes of ordinary politics that we are justified in running these risks? Professor Whyte apparently thinks they are....I would submit that judicial review of legislation under the Charter, in turn, has its own limitations and blind spots. Judges often fail to take into account, and indeed sometimes are exposed to the scantiest submissions on, the relationship of challenged law to its total social or political context.[55]

In effect, Russell is arguing for a "common sense" policy of sober second thought, allowing each branch of government to correct the deficiencies in the work of the other.

There are others who take stronger positions on both sides, but they add little except heat to the debate. There is one exception. In a 1983 article, Donald Smiley raises some interesting questions about patriation. He examines the Charter of Rights and Freedoms and is critical of both supporters and opponents of the Charter. He rejects as "indefensible" the argument by Lyon and others that entrenchment of the Charter was a renunciation of our monarchical and parliamentary traditions. He also ridicules the argument that rights have now been fully guaranteed through entrenchment. He indicates that a better name for the Charter would be "A Constitutional Enactment for the Better Protection of Certain Rights and Freedoms in Canada."[56] His most trenchant argument surrounds the types and numbers of rights that have been entrenched:

> Because of their traditions and experience, judges may be assumed to have some capacity for wisdom in ranking the competing claims of individual freedom and effective law enforcement. There is less reason to believe that judicial procedures will be an effective means of resolving intricate questions of social policy involving for example, "equality rights," the native peoples, and the official language provisions. *The fault of the process by which the Charter came into effect was not that it resulted in entrenchment per se, but rather the indiscriminate entrenchment of a large number of individual and group claims without sufficient discussion of the expected impact of constitutional recognition on particular kinds of rights or the political culture more broadly* [emphasis added].[57]

Thus, he questions not only the ability of the courts to handle complex social issues, as does Russell, but also the wisdom of entrenching so many new rights without consideration of how they will be reconciled without social confusion or upheaval. Unresolved in his mind is the matter of the *nonobstante* clause.

As we can see, arguments about section 33 have more to do with assumptions than practice, with personal judgement and deference than evidence.

Section 33- A Paper Tiger?

Whatever the expectations of those who supported or opposed the inclusion of section 33 in the Constitution Act, it is probably fair to say that no one could have predicted the lack of enthusiasm shown by Parliament and the provincial legislatures for its use. As noted above, it has only been used in two provinces, and it has never been used by Parliament. This is not because of a lack of controversy surrounding some of the decisions by the Supreme Court.

How can we explain what has not happened? One way would be to say that legislatures are being deferential to the courts in their new role, that they understand and accept the new relationship between the two institutions, a relationship in which the courts have the lead in matters relating to rights. This is unlikely. As Peter Russell points out, legislatures have not exactly been deferential in the past, and there is no evidence to suggest that this attitude has changed. That is, one cannot point to a series of debates in Parliament or the legislatures centred on this issue in which the houses came to the conclusion that they needed to accept a new role.

However, it is possible that attitudes toward the courts are being shaped in a more subtle way. In most matters, legislatures are subject to tight party discipline. This restricts the ability of members to express a legislative view on judicial decisions, apart from the view expressed by the executive branch of government. Recommendations on how to respond to court decisions come from ministers of justice on the advice of government lawyers. It is part of the system and culture that these officials are used to being deferential to courts and inclined to see their own future career options in that field. It is quite possible that this has an impact on decisions about the use of section 33.

Another explanation might lie in public perceptions. That is, judges are held in much higher esteem than legislators, who are viewed as "politicians." Recent polls indicate that the public not only rejects the idea that judges have too much power, they actually believe that judges should have more power.[58] Thus, in any fight between the two branches the legislators are unlikely to win. While this may seem plausible and have some impact on a decision about the use of section 33, it is probably not the major variable involved. Any fight between the two branches would involve a specific case or issue, which usually focuses the dispute away from the legitimacy of the protagonists. Put another way, being on the "right side" of the issue is more important than who you are in most cases.

A third explanation is that the use of section 33 might cause such a public outcry that legislators are afraid to use it. Again, this seems like an attractive explanation. Amongst the "chattering classes" there is substantial opposition to the very existence of section 33. Surely legislators would be reluctant to incur public wrath for its use. Again, however, the evidence is at best mixed in this regard. When section 33 was used in Quebec, public opinion was either favourable or neutral. Most of the informed public inside Quebec was also supportive. Outside the province opinion was generally opposed, but it made little difference. By contrast, in Saskatchewan in 1986 most of the informed opinion was fiercely opposed to the way that section 33 was used. The general public seemed apathetic. The government proceeded in spite of the opposition of the "chattering classes."

In Alberta section 33 was not actually used, but it was contemplated. In the *Vriend* case,[59] the Supreme Court "read in" a new section to Alberta human rights legislation protecting individuals from discrimination based on sexual orientation. The government of Alberta briefly considered using section 33 to exempt the legislation from the court decision, but decided not to do so. This was not because the legislature would have demurred. There was some political pressure not to use the clause, both from inside and outside the province, but there was also pressure in favour of its use. The consensus in the media seems to be that negative pressure caused the government to back down, but we have no way of really knowing this.

A better case for the use of section 33, one where public opinion seemed to be strongly behind government policy, involved the Supreme Court decision on tobacco advertising. In 1995 the Supreme Court held that the Tobacco Products Control Act

violated section 2 of the Charter, because it forbade the advertising of tobacco products.[60] The court held that a total ban was too drastic, and indicated that a "targeted" ban might be acceptable.[61] The decision caused a political furor because there was considerable social support for the control of this deadly product. The government responded by deferring to the court and redrafting legislation. Janet Hiebert is right to state that the Court's decision was flawed:

> The Charter, like other bills of rights, was intended to protect citizens and other human members of the polity. Thus, the Court's elevation of a corporate economic interest to the same status as individuals' constitutional rights, and its protection of that interest, are ill-conceived.[62]

This was hardly a case of an embattled minority needing court protection for its right to free speech. These were wealthy and powerful corporations using the courts to accomplish a commercial objective that they could not accomplish through the political process. The Parliament of Canada ought to have used the notwithstanding clause, if for no other reason than to buy time to sort out its legal situation. But despite many calls for its use, and powerful public support, the government decided to defer to the court.[63]

It is not clear that public opinion was a determining factor in the cases we have studied.

Three other explanations for the reluctance to invoke the notwithstanding clause need to be considered. The first is the "nuclear bomb" theory. That is, that the use of section 33 would be considered in most cases to be radical overkill, the equivalent of dropping the nuclear bomb in a war. There are other, less costly ways for legislatures to achieve their objectives. This may be a consideration, but only in marginal cases. Another explanation is that the use of section 33 is not a long-term solution to a problem involving a court decision on a Charter right, since the problem will return again in five years. This might be a small consideration, but it would not explain the federal government's reluctance in the case of the tobacco advertising decision. Finally, it could also be argued that in most cases the courts have been on the right track and that there has been no need for greater use of section 33. This is an interesting argument, which may in general be true. However, there are far too many specific cases where it could have been used for us to conclude that courts have been near perfect.

Since no single explanation seems powerful enough to fit each case, we are left with the rather weak conclusion that it is a combination of all of the above (and perhaps others not mentioned here), and that further study is needed to refine possible explanations.

If the legislatures have been reluctant to use section 33, the courts have not been reluctant to expand their role. Indeed, in the last decade they have been aggressive in enlarging their role and increasing their power in many respects. Courts seem inclined to go beyond what had been the established boundaries between the legislature and the judiciary.[64] They follow a pattern set by the Supreme Court itself. The most flagrant example of judicial expansion came in the so-called "Judges' Pay" decision.[65] In this judgement the Supreme Court rendered a decision involving remuneration schemes for provincial court judges in four provinces. The provincial judges had asked that various statutes freezing or reducing their remuneration be declared unconstitutional on the basis that they violated the independence of the judiciary.

In summary, the Supreme Court ruled, Justice La Forest G. dissenting, that the actions and statutes involved were unconstitutional. Some of the pronouncements in the judgement are breathtaking in their ambit. Not only did the Court strike down pay decisions, it went on to prescribe how such matters must be handled in the future:

> However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and other branches of government. The constitutional function of this body would be to depoliticize [*sic*] the process of determining changes to or freezes in judicial remuneration.[66]

There is no constitutional basis for this type of body, nor any authority for the court to create it. The Court simply "read in" a constitutional amendment creating commissions. The decision goes on to say, "*Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional* [emphasis added]."[67]

The Court based its judgement on the Preamble to the Constitution Act of 1867, and section 11(d) of the Charter. In his dissent, Justice La Forest G. disagreed with the majority on their interpretation of the preamble and with their conclusion that commissions are somehow mandated by section 11(d) of the Charter:

> Judicial independence must include protection against interference with the financial security of the court as an institution. However the possibility of economic manipulation arising from changes to judges salaries as a class does not justify the imposition of judicial compensation commissions as a constitutional imperative.[68]

Several things are noteworthy about this case. First, there is no apparent recognition by the court that it was in a conflict of interest. In the case of members of the legislatures, although they are allowed to set their own remuneration levels, members are subject to election within five years. Nor are there constitutional provisions that ensure that pay levels for members will not be reduced. That the court decided this matter as it did, without recognizing a conflict, is unacceptable. Second, the judicial scholarship involved in asserting that the Preamble to the Constitution Act of 1867 contemplates judicial independence of the type asserted in this judgement is questionable, to say the least.[69] Finally, while judges may incidentally "fill in the gaps" in the constitution through the extension of principles, this decision does much more. It actually creates new institutions. The issue here, however, is that none of the legislatures involved contemplated using the notwithstanding clause in this case. It should have at least been discussed, since the case turned in part on section 11(d).

Conclusions

Three important conclusions can be drawn from this discussion. The first is that section 33 now appears to be a paper tiger. It may become the equivalent of the powers of reservation and disallowance, available in theory, but not used in practice. This is, in part, due to the reasons argued above. It is also true that the less it is used, the less likely that it will be used.

Second, as anticipated by Professor Smiley, the courts have wandered deeply into social decisions that they are ill-equipped to address. Although they did not ask for this power, they must be restrained in their use of it.

Section 33 is not the instrument to correct this problem in the long run. It is at best a temporary stopgap to enable more dialogue. But it should not be abandoned.

Finally, given the power of the courts, we must think more about reform of the judiciary. This has to include appointment procedures, tenure, and the relationship between the courts and legislatures. If nothing is done, the observation by American jurist Charles Evan Hughes that "we are under a constitution, but the constitution is what the judges say it is" will be true.

Notes

1 Peter Russell, *Constitutional Odyssey*, 2nd ed. (Toronto: University of Toronto Press, 1993), p. 6.

2 Donna Greshner and Ken Norman, "The Courts and Section 33," *Queen's Law Journal*, Vol. 12, no.2 (1987), p. 163.

3 Sir John A. Macdonald thought that the power of disallowance was crucial for ensuring the supremacy of the federal government, but it has not been used since 1938.

4 Quoted in Leo Straus and Joseph Cropsey, *History of Political Philosophy*, 2nd ed. (Chicago: University of Chicago Press, 1973), p. 526.

5 Straus and Cropsey, *History of Political Philosophy*, p. 526.

6 Patrick J. Monahan, *Constitutional Law* (Toronto: Irwin Law, 1997) p. 3.

7 Monahan, *Constitutional Law*, p. 5.

8 This is an interesting point, not only in the current context, but because it raises the question of who watches the watchers. That is, if the Supreme Court of Canada reviews all actions of the executive and legislative branches, who reviews the actions of the courts? The answer is, at present, the Court itself, which is unacceptable to many. It would be interesting to see what would happen if a House of Commons committee attempted to review and declare particular actions of the court unconstitutional.

9 Frederick Vaughan, "Judicial Politics in Canada: Patterns and Trends," *Choices*, Vol. 5, no. 1 (June 1999), p. 9.

10 John D. Whyte, "On Not Standing For Nothwithstanding," *Alberta Law Review*, Vol. 28, no. 2 (1990), p. 351.

11 Honourable Guy Favreau, Minister of Justice, *The Amendment of the Constitution of Canada* (Queen's Printer, 1965), p. 22. This is an interesting proposal in light of the recent discussion about proper majorities in the Clarity Bill introduced in 1999. The figure of 55 percent appears to have some historical precedent.

12 For a full discussion of this matter, see Peter Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1997), pp. 605-17.

13 Several provinces, for example Saskatchewan, passed bills of rights as early as 1947.

14 As quoted in Bora Laskin, *Canadian Constitutional Law* (Toronto: Carswell, 1975), pp. 946.1 — 946.2.

15 Laskin, *Canadian Constitutional Law*, pp. 900.31 — 900.32

16 Gerald A. Beaudoin and Ed Ratushny, *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989), p. 58.

17 Ian Greene, *The Charter of Rights* (Toronto: James Lorimer & Co., 1989), p. 33.

18 There are many good descriptions of this three-year effort. Donald Smiley, in *Canada in Question*, 2nd ed. (Toronto: McGraw-Hill Ryerson, 1976), summarizes the effort quite well in chapter 2. He notes that the federal government was uneasy about broadening the process beyond patriation, an amending formula, and a charter of rights, but finally agreed to discuss institutions and the division of powers in stages two and three.

19 As quoted in Smiley, *Canada in Question*, p. 76.

20 A variation of this became section 1 of the Charter of Rights in 1981.

21 Roy Romanow, John Whyte, and Howard Leeson, *Canada Notwithstanding* (Toronto: Methuen, 1984), p. xvii.

22 Romanow, Whyte and Leeson, *Canada Notwithstanding*. Other good accounts are Robert Sheppard and Michael Valpy, *The National Deal* (Toronto: Fleet Books, 1982) and Keith Banting and Richard Simeon, *And No One Cheered* (Toronto: Methuen, 1983).

23 Briefing notes, *Continuing Committee of Ministers on the Constitution*, December 6, 1978, Charter of Rights section.

24 Saskatchewan Briefing Note (February 1979).

25 Several people have come forward to claim some credit for the inclusion of the notwithstanding clause. One prominent academic, Paul Weiler, writing in the Michigan Law School journal in 1984, outlines his meetings with various politicians and officials. It is clear that the possibility was "in the air" as we used to say. Paul Weiler, "Rights and Judges in a Democracy: A New Canadian Version," *Michigan Journal of Law Reform*, Vol. 17 (Fall 1984), p. 80, note 97.

26 Author's notes. Given the final positions of the provinces two years later, this is quite remarkable.

27 Author's notes.

28 Romanow, Whyte, and Leeson, *Canada Notwithstanding*, p. 54. Indeed, some Premiers like Sterling Lyon could hardly conceal their disdain for Trudeau, preferring to wait for a new Conservative government.

29 This is really an amazing period in Canadian political history. Trudeau had resigned as leader of the Liberal party in November of 1979, but was convinced to return after the Tory budget was defeated in the House in December 1979.

30 Michael Kirby, then Secretary to the Cabinet for Federal-Provincial Relations and now a Senator, was the chief strategist for the federal government on this matter. His "eyes only" memo was leaked by a federal civil servant to the Quebec government.

31 "Kirby Memorandum," Federal Government Secret Memo, p. 5.

32 For more detailed accounts of this period, see Romanow, Whyte and Leeson, *Canada Nothwithstanding*; Sheppard and Valpy, *The National Deal*; and Banting and Simeon, *And No One Cheered*.

33 The important elements of the Alberta formula were a general amending clause that required that any amendment have the support of the Parliament of Canada and two-thirds of the provinces representing 50 percent of the population, with the right to opt out of any amendment that derogated from the powers or privileges of the provinces; compensation for provinces opting out of any amendment where the federal government assumed the financial responsibility for a program; and a small list of items (matters like the monarchy) requiring unanimity.

34 Few believed that the PQ could agree to something that would damage their chances at attaining sovereignty-association in the future.

35 Author's notes.

36 The author was one of the four deputy ministers who negotiated the original package early in the evening, with other deputies from the provinces of Alberta, British Columbia and Newfoundland. The package was based on a possible compromise scribbled out on an envelope earlier in the day by Jean Chrétien and Roy Romanow in a kitchen off the meeting room.

37 Interestingly, my estimation was wrong. In a conversation some 10 years later, the former Deputy Minister of Intergovernmental Affairs in Alberta, Dr. Peter Meekison, indicated that they did not have strong feelings about this. It was a bargaining point for them and they would have accepted a proposal to remove section 2 from the application of section 33 if asked. No one did.

38 Author's notes.

39 Chaviva Hosek,"Women and the Constitutional Process," in Banting and Simeon, *And No One Cheered*, pp. 291-92.

40 Hosek, "Women and the Constitutional Process," p. 295.

41 Hogg, *Constitutional Law of Canada*, pp. 731-41.

42 For a discussion of this see J. Bayefsky, "The Judicial Function under the Canadian Charter of Rights and Freedoms," *McGill Law Journal*, Vol. 32 (1987), pp. 791-833.

43 *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712.

44 Canada *House of Commons Debates*, April 6, 1989, pp. 152-53.

45 "Pursuant to subsection 33(1) of the Canadian Charter of Rights and Freedoms, this act is declared to operate notwithstanding the freedom of association in paragraph 2(d) of the Canadian Charter of Rights and Freedoms." The bill was also exempted from the Saskatchewan Human Rights Code.

46 *Retail, Wholesale and Department Store Union (RWDSU) v. Saskatchewan* [1985] 5 W.W.R. 97 (Sask. C.A.). For a good discussion of this case see Greshner and Norman, "The Courts and Section 33," p. 155.

47 John D.Whyte, "On Not Standing For Notwithstanding"; Peter H. Russell, "Standing Up For Notwithstanding," *Alberta Law Review*, Vol. 29, no. 2 (1991), pp. 293-309.

48 I was one of the other chief advisors who also initially had misgivings, but succumbed to the logic of our Premier's arguments.

49 Whyte, "On Not Standing for Notwithstanding," p. 349.

50 Whyte, "On Not Standing for Notwithstanding," pp. 350-51.

51 Whyte, "On Not Standing for Notwithstanding," p. 352.

52 Whyte "On Not Standing for Notwithstanding," p. 355.

53 See Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2nd ed. (Toronto: Thompson Educational Publishing, 1994), p. 89. He lumps Russell in with Alan Borovoy and others.

54 Russell, "Standing Up for Notwithstanding," p. 295.

55 Russell, "Standing Up for Notwithstanding," p. 308.

56 Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," in Banting and Simeon (eds.), *And No One Cheered*, p. 91.

57 Smiley, "A Dangerous Deed: The Constitution Act, 1982," p. 92.

58 Luiza Chwialkowska, "Poll Shows Canadians Divided on Judges' Power to 'Make Law'" *National Post*, February 18, 2000, p. A4.

59 *Vriend v. Alberta* [1998] 1 S.C.R. 493

60 *R.J.R.-MacDonald v. Canada (Attorney-General)* [1995] 3 S.C.R. 199

61 Hogg, *Constitutional Law of Canada*, p. 843.

62 Janet L. Hiebert, "Wrestling With Rights: Judges, Parliament, and the Making of Social Policy," *Choices*, Vol. 5, no. 3 (July 1999), p. 11.

63 In the discussions about possible uses of the *nonobstante* clause in 1981, the tobacco case was one that came up. There was concern that although section 2 was supposedly drafted so as to exclude corporate free speech, there would come a time when the court would ignore the intentions of the drafters and find in favour of an ill-advised social practice on the basis of corporate free speech. It was thought that Parliament would have no trouble using the *nonobstante* clause in such a case. Alas, the drafters were wrong in both respects.

64 For example, in Saskatchewan a provincial judge thought nothing of ordering a new social program to be established in the province to meet the needs of her judgement, despite the fact that no monies had been voted for this purpose by the legislature. In this case, the program ordered has a social purpose that most would agree with, the treating of fetal alcohol syndrome. However, she seemed oblivious to the fact that it was not within judicial power to order the legislature to spend money to implement programs.

65 *Reference re Remuneration of the Judges of the Provincial Court of Prince Edward Island* [1997] 3 S.C.R. 3 [hereinafter *Reference re Remuneration of Judges*]

66 *Reference re Remuneration of Judges* [1997] at p. 13.

67 *Reference re Remuneration of Judges* [1997] at p. 13.

68 *Reference re Remuneration of Judges* [1997] at p. 21.

69 This is only the latest example of such a questionable judgement. In the recent *Secession Reference*, the Court asserted that "the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the Constitution Act." This extraordinary claim is made as if section 92A, altering powers over natural resources, did not exist.

Summary / Résumé

Section 33, The Notwithstanding Clause: A Paper Tiger?

Howard Leeson

This paper outlines the history of the so-called "notwithstanding clause" in the Canadian Charter of Rights and Freedoms, examining the reasons for its inclusion and acceptance in the constitutional negotiations that resulted in patriation of the Canadian constitution in 1982.

The story of how we came to adopt this provision is an interesting one indeed. The conceptual roots of Section 33(1) are found in earlier arrangements of the role of governments and Bills of Rights. However, the particular version that emerged in November 1981 and was ultimately enacted in 1982 had more to do with the raw politics of bargaining and chance phone calls late at night than with reasoned debate about what might constitute a rational compromise between democracy and constitutional law.

Section 33 has been praised by many as the quintessential Canadian compromise, an attempt to square the circle of constitutionally protected rights that are judicially enforceable with the desire to retain the British concept of parliamentary sovereignty. As might be expected, it has left many unhappy. Supporters of the judicial approach are outraged that legislatures may still apply majoritarian standards to questions of fundamental rights, while supporters of parliamentary sovereignty consider any devolution of sovereignty to non-elected judges to be a violation of democratic principles.

However, Section 33 has been used only sparingly, raising questions about the efficacy of the compromise, and the continued usefulness of this provision. Some believe that it will become like the power of disallowance - the federal power to veto any provincial act - theoretically available but never used. Others argue that as the courts become more active, blurring the lines between the powers of the legislature and the courts, section 33 ought to be used more often.

Although the reasons for the reluctance of legislatures to use Section 33 are not entirely clear, there is reason to believe it ought to have been invoked more often. There have been times when the courts have been too aggressive in their interpretations and legislatures too timid in their responses. If the trend continues, the observation by American jurist Charles Evan Hughes that, "we are under a constitution, but the constitution is what the judges say it is," will be true.

...

Le présent article résume à grands traits l'historique de l'article 33 de la Charte canadienne des droits et libertés, mieux connu sous le nom de clause dérogatoire ou clause nonobstant. L'auteur examine plus particulièrement les raisons qui ont présidé à la formulation et à l'adoption de cette clause lors des négociations qui ont abouti au rapatriement de la Constitution canadienne en 1982.

Sur le plan conceptuel, cette clause s'enracine dans des dispositions antérieures, consacrées au rôle des gouvernements et aux droits de la personne. En pratique, toutefois, le texte convenu en novembre 1981 et promulgué en 1982 doit plus à la négociation politique brute et aux tractations de dernière heure qu'à un débat raisonné visant à définir un compromis équitable entre démocratie et droit constitutionnel.

Pour plusieurs, l'article 33 constituait la quintessence du compromis « à la canadienne » : un effort en vue de concilier des droits garantis par la Constitution et justifiables devant les tribunaux avec le principe de la souveraineté parlementaire, hérité de la Grande-Bretagne. Mais, comme il fallait s'y attendre, cette solution n'a pas fait que des heureux.

Alors que les partisans de l'approche judiciaire s'indignent de ce qu'on permette encore aux assemblées législatives de statuer, à la majorité simple, sur des questions qui mettent en jeu des droits fondamentaux, les tenants de la souveraineté parlementaire de leur côté considèrent comme une violation des principes démocratiques toute délégation de pouvoirs à des juges non élus.

Quoi qu'il en soit, l'usage parcimonieux que l'on a fait jusqu'ici de l'article 33 soulève des questions quant à l'efficacité du compromis trouvé et quant à l'utilité de cette disposition. D'après certains juristes, l'article 33 connaîtra le même sort que le pouvoir de désaveu, qui confère au gouvernement fédéral le droit d'opposer son veto à une loi provinciale : cette disposition, qui existe bien en théorie, demeure inutilisée en pratique. D'autres soutiennent que, en ces temps où l'activisme des tribunaux vient brouiller la frontière entre pouvoir législatif et pouvoir judiciaire, on devrait recourir plus souvent à l'article 33.

On ne voit pas très clairement les raisons de cette hésitation à invoquer l'article 33, mais il y a lieu de croire qu'on aurait dû la surmonter plus souvent. Les tribunaux se sont parfois montrés trop agressifs dans leur interprétation des lois, et les législatures trop timides dans leur réaction à ces interprétations. Une telle tendance, si elle se maintient, pourrait donner raison au juriste états-unien Charles Evans Hughes, selon qui « nous vivons sous l'empire d'une Constitution, mais celle-ci ne contient que ce que les juges veulent bien y reconnaître ».